

Exhibit B

Excerpts of Transcript of September 5, 2017,
Omega v. 375 Canal, 12 Civ. 6979 (S.D.N.Y.)

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 OMEGA SA, SWATCH SA,

4 Plaintiffs,

5 v.

12 CV 6979 (PAC)

6 375 CANAL, LLC, ET AL.,

7 Defendants.
8 -----x

New York, N.Y.
September 5, 2017
2:57 p.m.

9
10 Before:

11 HON. PAUL A. CROTTY,

12 District Judge

13 APPEARANCES

14 COLLEN IP

15 Attorneys for Plaintiffs

16 BY: JOSHUA P. PAUL

JESS MICHOLO COLLEN

17 MICHAEL NESHEIWAT

18 SNR DENTON US LLP

Attorneys for Defendants

19 BY: AVI SCHICK

KIRAN PATEL

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1 conversed with the store clerk on that day?

2 Answer: No, it is not.

3 Now, as I read the cases, you have your two police
4 searches, you have the warning letter, the notice letter of
5 September 28 of 2011. As I understand the law, you have to
6 show that there's a continuation of supply after the notice
7 letter. So that turns us to May 19, 2012, purchase.

8 MR. PAUL: May -- excuse me.

9 THE COURT: That's an important date.

10 MR. PAUL: Yes, it is, your Honor.

11 THE COURT: And Mr. Cole says that his affidavit is
12 somehow inaccurate.

13 MR. PAUL: So if I may, your Honor, what --

14 THE COURT: So I don't care about what Mr. Taute says.

15 MR. PAUL: Of course.

16 THE COURT: I'm looking at Mr. Cole.

17 MR. PAUL: Right.

18 THE COURT: What's accurate about it, and what's
19 inaccurate? Is it, in fact, inaccurate?

20 MR. PAUL: It is -- He was present. He did not make
21 the purchase. If you'll permit me to explain. All of this has
22 come out in the depositions of the investigators. Four
23 investigators --

24 THE COURT: With due respect, I didn't have the
25 benefit of the depositions of the witnesses when I was reading

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1 the motion for summary judgement. I relied on the affidavits
2 as true.

3 MR. PAUL: However, your Honor, he came with three
4 people. They were all within the same area. Two people went
5 into the store. We have tape recordings and video --

6 THE COURT: This affidavit are sworn to under oath.
7 They're not composites.

8 MR. PAUL: Your Honor, he also testified at his
9 deposition that the reason he was unable to get things right
10 is, at the time we sent the draft to him, his wife was in the
11 hospital getting cancer treatments.

12 THE COURT: Oh, please.

13 MR. PAUL: He wasn't focusing.

14 THE COURT: The dog ate the homework?

15 MR. PAUL: I'm sorry?

16 THE COURT: The dog ate the homework?

17 MR. PAUL: Your Honor, I know it's serious, but -- I
18 agree it's serious, but the point, though, is what's material.
19 The fact -- you said in your opinion that the plaintiffs'
20 investigator purchased a counterfeit Omega watch from a store
21 clerk on May 19th. We have produced the three people who were
22 working with Mr. Cole that day who were present that day, one
23 purchased, one filmed.

24 THE COURT: I didn't know that. I read Mr. Cole's
25 affidavit as being the entire truth, and it turns out it's not

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1 the truth. What am I to do in those circumstances?

2 MR. PAUL: Your Honor, I think what is material.
3 Well, you have to decide what you're to do under those
4 circumstances. If you'll permit me, this came to my attention,
5 our attention -- you'll recall when we were here on August 2nd,
6 and I had disclosed to Mr. Schick and to the Court that in the
7 course of talking with Mr. Cole, preparing for trial, a number
8 of additional documents and those three additional witnesses,
9 the people he was working with, came to light to me and my firm
10 for the first time. We then --

11 THE COURT: Wait a minute. You were conducting the
12 investigation, weren't you? You retained these investigators
13 to go out on your behalf or on behalf of Swatch or Omega.

14 MR. PAUL: That's correct, your Honor.

15 THE COURT: So you didn't know how he was doing the
16 investigation?

17 MR. PAUL: I did not know how he was doing this
18 particular investigation. We had reports from him, and we
19 relied on those reports. We have worked with this gentleman in
20 the past. He's worked with plenty of other brand owners. I
21 think this was a unique situation where, again, he personally
22 did not purchase, but he saw the purchase. He had another
23 person actually make the purchase, Mrs. Leslie Quinonez, who
24 testified that she made the purchase. She recorded the whole
25 thing on a tablet. Mr. Cole videotaped the entire thing from a

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1 cell phone.

2 THE COURT: Listen, you may be a hundred percent
3 right, but that's not what the affidavit said. I'm relying on
4 the affidavit.

5 What about the statements here about -- at paragraph
6 6: This is not to say that all merchants along Canal Street
7 are -- I'm reading from Mr. Cole's affidavit -- are necessarily
8 selling counterfeit goods. But when the supply is available,
9 there is a high likelihood that, given the opportunity,
10 merchants who sell goods from Canal Street storefronts will try
11 to sell people...

12 He says, I didn't write that. I did not draft this
13 document. He signed the document, though. Did he sign the
14 document?

15 MR. PAUL: He did sign the document.

16 THE COURT: He says he didn't draft it. What good is
17 a document that the --

18 MR. PAUL: I don't think it's --

19 THE COURT: -- author of the document says I'm not the
20 author?

21 MR. PAUL: Your Honor, I'm not going to argue with you
22 on this point. I think it's not unusual for a lawyer, who's
23 retained an investigator, to prepare an affidavit and ask the
24 investigator to examine it, look at it, have a dialogue. I
25 think that's pretty much standard.

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1 In fact, Mr. Yarborough testified the same thing. He
2 has worked with firms throughout this city, large firms, small
3 firms, and this is how the work is done. Lawyers will draft
4 the affidavit based on reports, send it to the investigator,
5 and then there's a dialogue. Did this happen? Is this word
6 right? And the like.

7 THE COURT: Okay. Fair enough. At paragraph 6 of
8 Mr. Cole's affidavit he says what I just read into the record,
9 and he said, I didn't write that. So you're having a dialogue
10 about an affidavit that maybe lawyers prepared, and he
11 willingly signed because he's earning a fee and wants to
12 preserve his good relationship with the lawyers? And he says,
13 I didn't write this. What are you supposed to do in a
14 circumstance like that?

15 MR. PAUL: I think he didn't write it; that's a
16 factual statement. I don't think he disavowed that statement.
17 I don't think it was ever inquired, if you were to ask --

18 THE COURT: It's submitted to me in connection with a
19 motion for summary judgement. I have to decide the motion for
20 summary judgement. I'm relying on what he says because motions
21 for summary judgement are not made after hearings. Maybe they
22 should be, but they're not. They're made on affidavits
23 submitted, and they're presumed to be accurate. This turns
24 out, based on his deposition subsequent to his filing this
25 affidavit --

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1 MR. PAUL: I have a suggestion, your Honor.

2 THE COURT: -- subsequent to my making a decision in
3 your favor on the motion for summary judgment, where the
4 affidavit is wrong.

5 MR. PAUL: I have a suggestion.

6 THE COURT: What's the suggestion?

7 MR. PAUL: My suggestion is that we can have a short
8 evidentiary hearing on the question of whether, given the
9 actual evidence with the people who took -- who did this, we
10 can have a, what, 106 hearing for you to feel comfortable, as a
11 gatekeeper, that there is sufficient evidence of the
12 purchase -- excuse me, of the sale of this watch. We can do
13 that.

14 THE COURT: You're trying to --

15 MR. PAUL: But to put us back, your Honor, when --

16 THE COURT: You're trying to clean up the stable after
17 the horse has left.

18 MR. PAUL: Your Honor, the horse has left, that's for
19 sure. But if you're looking at the question, the dispositive
20 question of was a counterfeit watch purchased from this store
21 on May 19, the facts are unassailable.

22 THE COURT: Who's going to tell me that? Not
23 Mr. Cole, right?

24 MR. PAUL: Well, I don't think --

25 THE COURT: Even though that's what he told me before.

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1 MR. PAUL: Right.

2 THE COURT: Now that we know that that's not accurate,
3 you're going to send in --

4 MR. PAUL: Sure.

5 THE COURT: -- the truth squad?

6 MR. PAUL: Mr. Quinonez, who was present and --

7 THE COURT: Mr. Quinonez and his daughter didn't
8 submit affidavits, did they?

9 MR. PAUL: No, that's correct. He was our only
10 affidavit. That is absolutely correct. Mr. Cole was the sole
11 affidavit witness on that point, yes.

12 THE COURT: Okay.

13 MR. SCHICK: May I, your Honor, one moment?

14 THE COURT: Just a minute.

15 MR. PAUL: I just have a few other, unless you have
16 more questions, I'd just like to address --

17 THE COURT: I think I've heard enough on Mr. Cole.

18 MR. PAUL: Okay.

19 THE COURT: What about Mr. Yarborough?

20 MR. PAUL: Well, Mr. Yarborough, we have no intention
21 of calling. In fact, let me just be clear. What he said in
22 his declaration, he was absolutely clear. He said he made it
23 clear that he personally did not see anything, do anything. He
24 was recounting the actions of other investigators, as sort of a
25 senior person at the firm.

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1 What he said is, one, one particular gentleman, Robert
2 Goldkind toured -- went on tour bus -- tour buses and took down
3 notes of what the tourist guides were telling people about the
4 Canal Street area. He didn't purport to have seen that
5 himself.

6 No. 2, I think the one statement that he makes that
7 turned out not to be accurate was the fact that there was only
8 one other occasion, other than the December 2010, when there
9 was someone from his agency visited the property. I'm not
10 sure -- he was incorrect about that. I'm not sure that that
11 was material to the summary judgement decision.

12 As you pointed out, the failed buys -- as you pointed
13 out in the summary judgement decision, evidence of failed
14 purchases are not relevant. Again, if I did not have to deal
15 with Larry, Moe and Curly --

16 THE COURT: Not relevant on the motion for summary
17 judgement because there were enough facts that I could rely on
18 to say that there were questions of fact, general issues of
19 material fact, but, you know, the fact is that doesn't mean
20 that they couldn't be considered at trial. I was limiting my
21 analysis --

22 MR. PAUL: Of course.

23 THE COURT: -- to the motion for summary judgement.

24 MR. PAUL: Fair. That's fair.

25 So Mr. Yarborough's testimony is not material to the

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1 summary judgement, and we do not plan on calling him at trial.

2 Again, I want to step back and say that I am not
3 pleased that the investigators involved conducted themselves as
4 they did. I mean, I wish that were not the case, but you know,
5 what we're considering -- what your Honor is considering is
6 some very drastic orders that, you know, are going to prejudice
7 our clients. But my point is that when there's -- I agree that
8 your Honor is offended, and rightly so, that Mr. Cole did not
9 tell the truth.

10 THE COURT: Yes.

11 MR. PAUL: Okay? I share that, but the point is --

12 THE COURT: I'm also troubled by the fact that I know
13 I relied on his affidavit in denying the defendant's motion for
14 summary judgement.

15 MR. PAUL: I understand that. I understand that.

16 THE COURT: So I think you procured a judgment which
17 maybe you weren't entitled to.

18 MR. PAUL: Well, your Honor, I just want to make sure
19 we're clear on one point. We were entitled, and are entitled,
20 to summary judgement because the evidence is that a counterfeit
21 Omega watch was sold at 375 Canal Street. That is the
22 evidence. Ms. Quinonez purchased it. Mr. Cole and
23 Mr. Quinonez watched her do that, and there were two
24 recordings, one from the sidewalk and one from Ms. Quinonez.

25 THE COURT: So you say, but that's not what you told

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1 me at the motion for summary judgement stage, right?

2 MR. PAUL: That's correct. That's not what we
3 understood to be the facts.

4 THE COURT: So had you told me this, given me this
5 information, or had Mr. Cole and the others not submitted
6 affidavits, which are now regarded as perhaps false but
7 certainly inaccurate, I wouldn't have granted the motion for
8 summary judgement -- I wouldn't have denied the motion for
9 summary judgement.

10 Mr. Schick, you wanted to say something?

11 MR. SCHICK: Yes, I just wanted to clear up a few
12 short points here so that your Honor has a right context of the
13 facts.

14 Mr. Paul introduced sort of how Mr. Taute will somehow
15 verify the events. Just to be clear, Mr. Taute was thrown out
16 of the Police Department well before 2012; so he has nothing to
17 say about the events of 2012.

18 THE COURT: As a matter of fact, he had left the
19 Police Department by 2011; isn't that right?

20 MR. SCHICK: Correct. So he has nothing to say about
21 the events that day.

22 With respect to Mr. Paul trying to imply that all the
23 investigators that day were sort of grouped up together, the
24 testimony was that Mr. Cole and Mr. Quinonez were outside the
25 store; so they were not inside the store. They did not witness